

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:

DIGITAL DOMAIN MEDIA GROUP, INC.,  
*et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No. 12-12568 (BLS)

Joint Administration Requested

Doc. Ref. Nos. 16 &amp; 17

**ODDLOT ENTERTAINMENT, LLC'S LIMITED OBJECTION TO THE DEBTORS'  
MOTION FOR AN ORDER APPROVING PROCEDURES FOR SALE OF ASSETS AND  
RESERVATION OF RIGHTS WITH RESPECT TO THE DEBTORS' MOTION FOR  
AN ORDER APPROVING AGREEMENT OF SALE AND AUTHORIZING THE SALE  
OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS**

OddLot Entertainment, LLC ("**OLE**") hereby objects (the "**Limited Objection**") to the *Motion of the Debtors for an Order (A) Approving Procedures for Sale of Assets; (B) Scheduling Auction and Hearing to Consider Approval of Sale and Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; (C) Approving Forms of Notice; and (D) Granting Related Relief* [Docket No. 17] (the "**Bid Procedures Motion**") and hereby reserves all of its rights and remedies with respect to the Debtors' *Motion for an Order: (I) Approving Agreement of Sale and Authorizing the Sale of Substantially All of the Debtors' Assets; (II) Authorizing the Sale of Assets Free and Clear of All Liens, Claims, Encumbrances and Interests Pursuant to Sections 363(B), (F) and (M) of the Bankruptcy Code; (III) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (IV) Granting Related Relief* [Docket No. 16] (the "**Sale Motion**"). In support of this Limited Objection, OLE respectfully represents as follows:

<sup>1</sup> The Debtors in these proceedings and the last four digits of each Debtor's federal or foreign taxpayer identification number, if any, are as follows: D2 Software, Inc. (5602); DDH Land Holdings, LLC; DDH Land Holdings II, LLC; Digital Domain (8392); Digital Domain Institute, Inc. (6275); Digital Domain International, Inc. (9344); Digital Domain Media Group, Inc. (9505); Digital Domain Productions, Inc. (5757); Digital Domain Productions (Vancouver) Ltd. (6450); Digital Domain Stereo Group, Inc. (4526); Digital Domain Tactical, Inc. (6809); Mothership Media, Inc. (2113); Tradition Studios, Inc. (4883); Tembo Productions, Inc. (7634).. The Debtors' mailing address is 10250 SW Village Parkway, Port St. Lucie, Florida 34987.



## PRELIMINARY STATEMENT

1. OLE, Summit Entertainment, LLC (“**Summit**”) and certain of the Debtors entered into a series of agreements pursuant to which certain of the Debtors agreed to provide visual, digital and animation effects for the motion picture *Ender’s Game* (“***Ender’s Game***”) and, in exchange, OLE and Summit agreed to (a) pay the Debtors for such services at cost, (b) pay the Debtors an approximately \$10 million deferred fee out of the net proceeds *Ender’s Game* (if any) and (c) provide the Debtors the opportunity to purchase a minority equity interest in *Ender’s Game*. As of June 30, 2012, the Debtors had made an equity investment of \$17.2 million in *Ender’s Game*.

2. OLE and Summit have also made significant equity investments in *Ender’s Game*, which has a production budget slightly in excess of \$100 million and is scheduled for theatrical release in the fall of 2013. Principal photography for *Ender’s Game* is complete. The post-production visual, digital and animation effects are in process and must be completed quickly for the picture to be released on time.

3. OLE is generally supportive of the Debtors’ efforts to sell their assets. It is of paramount importance to OLE that the visual, digital and animation effects for *Ender’s Game* be completed according to schedule. However, the bid procedures proposed by the Debtors in the Bid Procedures Motion (the “**Bid Procedures**”) lack important protections for OLE and other parties-in-interest who have a stake in a successful and fair sale process, and, therefore, the Bid Procedures should be clarified and modified in certain respects.

4. OLE hereby requests that the Bid Procedures be modified to provide that (a) the deadline to object to the Sale Motion be three days after the Auction (as defined below), (b) all potential bidders are put on notice that it is OLE’s position that the series of agreements

defining the Debtors' rights and obligations in connection with *Ender's Game* form a single agreement and must all be assumed together, (c) a bidder may not remove contracts from the list of contracts to be assumed and assigned following the closing of the Auction, (d) OLE be permitted to attend the Auction, (e) copies of all bid materials be provided to OLE, and (f) OLE be given consultation rights with respect to the sale, including the determination of the winning bidder.

### **BACKGROUND**

5. On September 11, 2012 (the "**Petition Date**"), the Debtors commenced their bankruptcy cases by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code. Also on the Petition Date, the Debtors filed, among other pleadings, the Bid Procedures Motion and the Sale Motion. The Bid Procedures Motion seeks court approval of extremely expedited sale proceedings, culminating in a sale hearing (the "**Sale Hearing**") and closing of the sale on September 24, 2012, as well as overbid protections for a stalking horse bidder. The Sale Motion seeks to sell substantially all of the Debtors' assets to the stalking horse bidder or such other higher and better bidder at an auction to be held on September 21, 2012 (the "**Auction**").

6. As noted above, prior to the Petition Date, OLE, Summit and certain of the Debtors entered into a series of related agreements (the "**Agreements**") pursuant to which certain of the Debtors agreed to provide visual, digital and animation effects for *Ender's Game* at cost, in exchange for the ability to purchase a minority equity interest in the project. The Agreements include:

- a. The Production Services Agreement dated as of April 18, 2011 (the "**Services Agreement**") among Ender's Game Holdings, LLC ("**EGH**"), OLE, Ender's Game Productions NOLA, LLC and Ender's Game Productions BC Inc., on

the one hand, and Digital Domain Productions, Inc. and Digital Domain Productions (Vancouver), Ltd., on the other hand, pursuant to which the Debtors agreed to provide visual, digital and animation effects for *Ender's Game* at cost plus a deferred fee of approximately \$10 million to be paid out of the net proceeds of *Ender's Game* pursuant to the waterfall set forth in the Investment Agreement (as defined below).

- b. The Investment and Production Agreement dated as of February 15, 2012, with effect as of April 18, 2011 (the "**Investment Agreement**") by and among the Digital Domain Media Group, Inc., EGH and OLE, pursuant to which the Debtors agreed to provide between 25% and 37.5% of the equity financing for *Ender's Game*.
- c. The Financier Three Party Agreement dated as of February 15, 2012 (the "**Three Party Agreement**") among EGH, OLE, Digital Domain Media Group, Inc. and Summit, pursuant to which EGH, OLE, the Debtors and Summit agreed upon how *Ender's Game* would be financed and various related matters.
- d. The letter agreement dated as of June 22, 2012 among OLE, EGH, Digital Domain Media Group, Inc. and Summit clarifying the Three Party Agreement.
- e. The Completion Guaranty Agreement dated as of February 15, 2012 (the "**Completion Guaranty Agreement**"), between, on the one hand, Comerica Bank for the benefit of the Agent and the Banks, OLE, Digital Domain Media Group, Inc., as beneficiaries, and, on the other hand, Fireman's Fund Insurance Company, acting through its agent International Film Guarantors, LLC (the "**Insurer**"), as guarantor, pursuant to which the Insurer guaranteed to the beneficiaries completion of *Ender's Game*.
- f. The Side Letter Agreement dated as of February 16, 2012, pursuant to which OLE and the Debtors agreed to provide various inducements to the Insurer so that the Insurer would enter into the Completion Guaranty Agreement and various other agreements.
- g. The Amendment dated as of April 26, 2012 among Comerica Bank, for the benefit of the Agent and the Banks, Odd Lot Pictures, LLC, Digital Domain Media Group, Inc., OLE, EGH, *Ender's Game* Productions, LLC, *Ender's*

Game Productions BC, Inc., Ender's Game Productions NOLA, LLC, and Fireman's Fund Insurance Company, acting through its agent International Film Guarantors, LLC, amending, among other things, the Completion Guaranty Agreement.

- h. The Agreement to Extend Delivery Date dated as of February 15, 2012 among Odd Lot Pictures, LLC, OLE, Digital Domain Media Group, Inc., EGH, Ender's Game Productions, LLC, Ender's Game Productions BC, Inc., Ender's Game Productions NOLA, LLC, Ender's Game Financing LLC, Summit, Sierra/Affinity LLC and Fireman's Fund Insurance Company, acting through its agent International Film Guarantors, LLC, pursuant to which various delivery dates under the Completion Guaranty Agreement and various other agreements were extended.
- i. The Undertaking dated as of July 30, 2012 among OLE, Summit, Digital Domain Media Group, Inc. and Comerica Bank, as Agent for the Lenders, pursuant to which OLE, Summit and the Debtors agreed to pay certain interest obligations to Comerica Bank.
- j. The Guarantee Agreement dated as of February 15, 2012, pursuant to which the Debtors guaranteed to the Insurer that they would promptly and timely perform their obligations under the Services Agreement.
- k. Change Order No. 1 dated September 4, 2012 and accepted September 7, 2012 between Digital Domain and Ender's Game Productions NOLA, LLC.
- l. Change Order No. 2 dated September 4, 2012 and accepted September 7, 2012 between Digital Domain and Ender's Game Productions NOLA, LLC.

7. Although contained in a handful of separate documents, the Agreements constitute one single integrated agreement that must be assumed/assigned in whole.

### **ARGUMENT**

8. As noted above, OLE is generally supportive of the Debtors' sale process and is not contesting the urgency of the Debtors' financial situation. However, the Debtors

should still be required to establish a fair and open process. To achieve this fair and open process, this Court should make the modifications to the Bid Procedures set forth below. In addition, OLE expressly reserves its rights to object to the Sale Motion at the Sale Hearing.

**A. The Deadline for Objecting to the Sale Motion Should Be Extended**

9. The Bid Procedures Motion requests approval of an extremely expedited timeline for the sale of the Debtors' assets. OLE understands that, given the Debtors precarious liquidity situation, the Debtors must quickly sell their assets. However, such urgency should not excuse the Debtors from abiding by the basic requirements of due process.

10. The Bid Procedures provide for an Auction on Friday, September 21, 2012 and a sale hearing on Monday, September 24, 2012. The deadline for objections to the Sale Motion is September 21, 2012. Parties-in-interest will thus be required to object to the Sale Motion before they even know the outcome of the Auction. Fundamentally, such a requirement is not fair to parties-in-interest.

11. As noted above, it is of paramount importance to OLE that the visual, digital and animation effects for *Ender's Game* be completed according to schedule. Without knowing the identity of the proposed buyer, the ability of the proposed buyer to perform the obligations under the Agreements or whether the proposed buyer is even assuming the Agreements, OLE will not be able to determine whether the proposed sale will enable the visual, digital and animation effects for *Ender's Game* to be completed according to schedule.

12. The deadline for objections to the Sale Motion, including any objections to the assumption, assignment and/or rejection of any contracts, should be extended until the morning of September 24, 2012 so that OLE will at least have the weekend to prepare and file an objection to the Sale Motion, if necessary.

**B. The Bid Procedures Should Provide that the Agreements Form a Single Contract, Must All Be Assumed Together**

13. As noted above, although contained in a handful of separate documents, the Agreements constitute one single integrated agreement that must be assumed/assigned in whole. The Asset Purchase Agreement attached to the Bid Procedures Motion as Exhibit A includes only the Services Agreement, the Investment Agreement and the Completion Guaranty Agreement as Assigned Contracts on Schedule 1.1(a), and omits the balance of the Agreements. OLE does not believe that the proposed buyer can assume the Services Agreement, the Investment Agreement and the Completion Guaranty Agreement without assuming all of the Agreements. Although the issue of whether the Agreements form a single agreement does not need to be resolved by this Court until the hearing on the Sale Motion, to protect its rights and put potential bidders on notice, OLE requests that the Bid Procedures be modified so as to inform all potential bidders that it is OLE's position that all of the Agreements must be assumed and assigned together and that a buyer cannot assume certain of those Agreements without assuming all of them.

14. It is well established that "bankruptcy law generally does not permit a debtor or an estate to assume the benefits of a contract and reject the unfavorable aspects of the same contract." In re Am. Home Mortgage Holdings, Inc., 402 B.R. 87 (Bankr. D. Del. 2009) (quoting Folger Adam Sec., Inc. v. DeMatteis/MacGregor, JV, 209 F.3d 252, 264 (3d Cir. 2000)). As with any executory contract, the debtor "must either assume the entire contract, *cum onere*, or reject the entire contract, shedding obligations as well as benefits." In re Phila. Newspapers, LLC, 424 B.R. 178, 183 (Bankr. E.D. Pa. 2010) (citing Stewart Title Guar. Co. v. Old Republic Nat'l Title Co., 83 F.3d 735, 741-42 (5th Cir. 1996)). This principle applies equally in circumstances where, as here, multiple instruments are properly viewed, based on the

parties' intent and the circumstances surrounding the execution of the instruments, as a single contract for purposes of contract assumption and rejection. See, e.g., In re T & H Diner, Inc., 108 B.R. 448, 454-55 (D.N.J. 1989); In re Atl. Computer Sys., Inc., 173 B.R. 844, 849 (S.D.N.Y. 1994); In re GP Express Airlines, Inc., 200 B.R. 222, 228 (Bankr. D. Neb. 1997).

**C. Bidders Should Not Be Permitted to Change Which Contracts Are Being Assumed After the Close of the Auction**

15. Pursuant to Section 1.6(a) of the Asset Purchase Agreement attached to the Bid Procedures Motion as Exhibit A, the buyer is permitted to change the schedules to the Asset Purchase Agreement to add or remove contracts to be assumed and assigned at any time prior to the closing of the sale. Accordingly, the buyer or another bidder may agree at the Auction to assume numerous contracts and related liabilities and then, after winning the Auction and obtaining court approval of the sale, change the schedules to the Asset Purchase Agreement to remove the contracts and avoid assuming the liabilities. It is unclear to OLE how the Debtors could determine the highest and best bid at the Auction without knowing which contracts are being assumed.

16. Given the importance of the assumption of all of the Agreements to the success of *Ender's Game*, OLE is particularly concerned that a buyer may agree to assume all of the Agreements at the Auction and the hearing on the Sale Motion, only to turn around and assume only certain of the Agreements after this Court has approved the sale. Accordingly, OLE requests that the Bid Procedures be modified to prohibit bidders from removing contracts from the assumption schedule after the Auction.

**D. The Bid Procedures Should Provide that OLE May Attend the Auction and Must Be Consulted by the Debtors**

17. As set forth in the Agreements, the Debtors, OLE and Summit are all equity investors in *Ender's Game*. As such, it is OLE's position that the consent of OLE and

Summit are required prior to the sale of the Debtors' equity interests in *Ender's Game*, and, to date, neither OLE nor Summit has provided such consent. Any attempt by the Debtors to assign their equity interests in *Ender's Game* requires the consent of OLE and Summit. See 6 Del. Code Ann. § 15-202(a) (providing that a partnership may be formed, under Delaware law, whether or not the parties so intend); 6 Del. Code Ann. § 15-502; In re Schick, 235 B.R. 318, 325 (Bankr. S.D.N.Y. 1999) (finding a partnership interest unassignable under section 365(c)).

18. OLE acknowledges that whether or not its consent to the sale of the Debtors' equity interests in *Ender's Game* is required is an issue to be decided at the sale hearing and not the bid procedures hearing. However, OLE believes that it would be in the best interests of the Debtors and their estates for OLE to be permitted to attend the Auction and for the Debtors to provide copies of all bids to OLE and consult with OLE regarding the determination of the highest and best bid. Whether OLE will be willing to consent to the sale or intends to withhold its consent should be a relevant factor in the Debtors' determination of the highest and best bid.

19. Accordingly, OLE requests that the Bid Procedures be revised to provide that OLE may attend the Auction and that the Debtors will provide copies of all bids to OLE and consult with OLE before determining the highest and best bid.

**E. Reservation of Rights to Object to the Sale Motion**

20. OLE expressly reserves its rights to object to the Sale Motion and assumption and assignment of the Agreements on any and all grounds at the Sale Hearing, including, without limitation, that the sale may not proceed without OLE's consent, that all defaults under the Agreements have not been cured and that the Debtors have failed to show adequate assurance of future performance.

## **CONCLUSION**

WHEREFORE, OLE respectfully requests that any order this Court enters granting the relief requested in the Bid Procedures Motion modify the Bid Procedures to provide that (a) the deadline to object to the Sale Motion be three days after the Auction, (b) all potential bidders are put on notice that it is OLE's position that the Agreements form a single agreement and must all be assumed together, (c) a bidder may not remove contracts from the list of contracts to be assumed and assigned following the closing of the Auction, (d) OLE be permitted to attend the Auction, (e) copies of all bid materials be provided to OLE, and (f) OLE be given consultation rights with respect to the sale, including the determination of the winning bidder.

Dated: September 12, 2012  
Wilmington, Delaware

Respectfully Submitted,

/s/ Kara Hammond Coyle

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